IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA

Appellants,

v.

CECEIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Appellee.

On Appeal From The United States District Court For The Western District of Virginia

BRIEF OF THE STATES OF HAWAII, IDAHO, INDIANA, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA AND OREGON, AMICI CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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INTERESTS OF AMICI CURIAE

The States, appearing as *amici curiae* here, have from the earliest days of their founding exercised the power to regulate the use of private non-federal lands within their borders and to make decisions respecting the development of mineral reserves and other natural resources vital to their progress and prosperity and that of their citizens. The States' powers over lnd and land use, and those integrally related thereto, include the exercise of eminent domain, the enactment of laws for the devolution and free alienation of interests in real estate, the promulgation of zoning and land use statutes and regulations, and the taxing powers of the States, and their counties, cities, municipalities and other political subdivisions.

It need hardly be emphasized that the States have a compelling and overriding interest in the preservation of these integral functions and that they are deeply concerned by the federal government's assertion of pre-emptive or supervening authority with respect to private land use within the States under the guise of legislation purporting to regulate interstate commerce. Accordingly, *amici curiae* respectfully urge that the Court accept jurisdiction to hear and decide the important constitutional question presented by the Jurisdictional Statement of the Commonwealth of Virginia, the Virginia Surface Mining and Reclamation Association and the Town of Wise, Virginia.

QUESTION PRESENTED

Whether the provisions of the Federal Surface Mining Control and Reclamation Act which interpose federal regulatory controls on the use of private non-federal lands within a state constitute a valid exercise of the power of Congress under the Commerce Clause of the Constitution of the United States?[1]

THE QUESTION IS SUBSTANTIAL

Title V of the Federal Surface Mining Control and Reclamation Act of 1977, on its face in explicit terms, and by the description of its sponsors in Congress, is designed to regulate the use of private lands within a state. The Act dictates the terms and conditions under which the states may grant, renew or terminate permits to surface mine coal on private lands, 30 U.S.C. 1252, 1256 and 1257; its pre-empts state statutes and regulations found not to be in conformity with these federal dictates, 30 U.S.C. 1253(b) and 1254(g); it deals extensively with post-mining uses of these private lands, 30 U.S.C. 1265(c) and (e); and it establishes criteria under

[1] The State of Illinois joins in urging the Court to note probable jurisdiction to consider the important constitutional question presented here. Illinois intends to file its own amicus curiae brief on the merits of this case in the event the Court accepts jurisdiction.

which certain land may not be mined for coal and other land must be designated by the States as unsuitable for mining, 30 U.S.C. 1272.

Such land use regulation has historically been the exclusive function of the States, subject only to constitutional limitations against taking of property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). Consequently, the Act raises the critical question whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interestate commerce. Such a confiscation of the powers of the States is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontations with the Commerce Clause.

Though the federal commerce power has been broadly construed to cover local activities related to production of goods for commerce, it has never been extended to authorize local land use regulation. The courts have uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Art. 4, § 3, Clause 2 of the Constitution, *i.e.,* legislative powers over federal lands. *See, Kansas* v. *Colorado,* 206 U.S. 486 (1906). *United States* v. *Arizona,* 295 U.S. 174 (1935); *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955); and *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976). If the Commerce Clause is now construed to give the federal government the power to dictate the terms and conditions upon which the States may permit land to be used for surface mining coal, it is self-evident that this same power exists in respect to all uses of land, whether for agricultural, commercial, industrial or mining activities.

Such power would authorize federal land use regulations governing every endeavor which remotely affects commerce. The traditional authority of the States over land use would be significantly curtailed, if not eviscerated. Such an expansion

of federal power to the detriment of the States contradicts this Court's most recent pronouncement on conflicts between the Commerce Clause and the Tenth Amendment, *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976). This cannot be condoned because it constitutes a drastic restructuring of the traditional ways in which State and local governments arrange their affairs, and a serious invasion of the sovereign powers of the States. In such a context there can be no limits whatever to federal regulation of land use, and State control of private land uses would for all practical purposes be a dead letter.

CONCLUSION

For the reasons given above, amici curiae respectfully urge that the court note probable jurisdiction.

Respectfully submitted,

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